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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIGNAL OIL AND GAS COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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I.

The Alleged Assessments Against Signal Gasoline Corporation Are Invalid.

Appellee cites no authority for its contention that the alleged assessments against Signal Gasoline Corporation were valid, excepting *McPherson v. Commissioner,* 54 Fed. (2d) 751, and *Buzard v. Helvering,* 77 Fed. (2d) 391.

As shown in appellant's opening brief, the *McPherson* case has been substantially overruled by this Court in *G. M. Standifer Construction Corp. v. Commissioner,* 78 Fed. (2d) 285, and rendered inapplicable to cases of

this type by the decision of the Supreme Court of the United States in *United States v. Continental National Bank & Trust Co.,* 305 U. S. 398.

The decision in *Buzard v. Helvering, supra,* is not in point at all, as there the proceedings in the Court of Appeals of the District of Columbia were by the statutory trustees as an entity and not by the corporation. See page 29 of appellant's opening brief.

On page 15 of its brief, appellee attempts to distinguish the case of *G. M. Standifer Construction Corp v. Commissioner, supra,* by stating that it was a fully dissolved corporation and without either statutory or judicially designated trustee, attempting, nevertheless, to litigate as a live corporation. That decision establishes a principle which appellant is relying on in this proceeding, namely, that when a corporation is dissolved and there is no statutory provision for continuing its corporate existence for any purpose, the dissolution of the corporation absolutely destroys it and all pending actions against the corporation are abated, and the corporation is thereafter incapable of acting or suing or being sued. See, also, *Oklahoma Natural Gas Co. v. State of Oklahoma,* 273 U. S. 257; *Crossman v. Vivienda Water Co.,* 150 Cal. 575, 89 Pac. 335, and *Brandon v. Umpqua Lumber Co.,* 166 Cal. 322, 136 Pac. 62, 7 Cal. Jur. 37-38.

The only difference between the *Standifer* case and the case at bar was that in the *Standifer* case the corporation continued in existence for five years, acting through its statutory trustees, after which it became entirely de-

stroyed, whereas in the case at bar, Signal Gasoline Corporation became destroyed immediately, but a new entity, its statutory trustees, was set up to take over the assets and liabilities. In each case, however, the corporation was destroyed, one at the end of five years and the other immediately.

On page 17 of its brief, appellee contends that appellant should be estopped from questioning the validity of the alleged assessments made against the Signal Gasoline Corporation. Appellee cites *Warner Colleries Co. v. United States,* 63 Fed. (2d) 34; *Buzard v. Helvering, 77* Fed. (2d) 391.

In *Warner Colleries Co. v. United States, supra,* there were grounds for estoppel, whereas in the case at bar, there are no grounds for estoppel, as is shown by the fact that appellee has not squarely met the issue of estoppel. It has merely asked for the benefits of the doctrine of estoppel, without squarely meeting the issue or discussing the subject.

In *Warner Colleries Co. v. United States, supra,* a petition was filed by the dissolved corporation in its name, which petition was signed by persons who designated themselves as officers of the corporation, and the corporate seal was used. No statement was made in the petition that the company had been dissolved. Before the Board of Tax Appeals, also, the representatives of the corporation signed a stipulation, substantially reducing the taxes and agreeing that the taxes could be assessed against the corporation. Furthermore, the successor corporation which was

held liable for the tax, ratified the acts of its directors who signed the petition as officers of the dissolved corporation. Consequently, the Board could safely proceed on the theory that it was dealing with an existing corporation. Naturally that corporation or its successors could not contend that the Board was put on notice of the dissolution, and therefore could not contend that the proceedings were void. There was a clear case of estoppel on the basis of the facts involved.

As to *Buzard v. Helvering,* also cited by appellant on page 17, as authority for its estoppel plea, as has been previously shown the proceeding there was not against the corporation but against the statutory trustees as an entity, hence it is not a case which holds that an assessment can be made against a dissolved corporation because of the estoppel of its representatives. No suit of a corporation was involved, but it was a suit against the new entities, the statutory trustees.

II.

The Statute of Limitations Bars These Actions.

Appellant, on pages 18 to 23, inclusive, of its brief, merely points out a few matters which have always been understood in this case, namely, that appellant, except for the statute of limitations, is liable under law and equity for the additional taxes (if any) of Signal Gasoline Company and Signal Gasoline Corporation; that Section 280 of the Revenue Act of 1926 has nothing to do with suits without assessment; that the statute of limitations involved in the case at bar is Section 278 (d) of the Revenue Act of 1926; that if the alleged assessments made against Signal Gasoline Corporation were valid, as to case No. 1460-Y, the only question remaining is whether under Section 278 (d), the Government had six years after an assessment against a first transferee to sue a second transferee, and as to case No. 1461-Y, one question is the same as that stated with respect to case No. 1460-Y, and the further question is whether the statutory trustees of Signal Gasoline Corporation constituted the first transferees and appellant the second transferee of the assets of Signal Gasoline Corporation.

Case No. 1460-Y.

As to case No. 1460-Y, involving the taxes of Signal Gasoline Company, allegedly assessed against Signal Gasoline Corporation, and sought to be recovered in suit against appellant, the appellant sets up two defenses.

The appellant contends that the suit is barred for two reasons: First, that the alleged assessment against Signal

Gasoline Corporation was void; and second, that even if it was valid, it did not give the Government six years within which to sue appellant, because appellant is the transferee of the transferee of Signal Gasoline Company, and the case of *United States v. Continental National Bank & Trust Co., supra,* decided that Section 278 (d) does not give the Government six years within which to sue the transferee of a transferee.

The appellee is apparently not satisfied with the decision of the Supreme Court in *United States v. Continental National Bank & Trust Co.,* seemingly casting some doubt upon its present validity, on pages 24 and 25 of the brief. Appellee also, on page 25 of its brief, says the *Continental* case is not applicable, except to transferees of an individual taxpayer, and bases this contention again on its plea of estoppel. But of course there was as strong an equity in favor of the Government in the *United States v. Continental* case as there is in the case at bar; that is to say, the tax was obviously owed in the *Continental* case, but the court held that the Government was delinquent in proceeding against the proper transferees. The tax that the Government lost there was huge, amounting to over $295,000 with interest. Furthermore, the original taxpayer there, as in the case at bar, was a corporation.

The appellee says, on page 25 of its brief, that the fiction of corporate entity will be disregarded if justice requires it. The appellee impliedly contends that justice does not require the use of the statute of limitations specifically enacted by Congress. As a matter of fact, justice requires that there be a repose with respect to litigation, and that principle is just as important to the proper working of the national fisc as is the collection

of a tax in an individual case. The citizens of the United States have to have confidence in the taxing authorities and the courts construing tax statutes, including confidence in the protection afforded by the statute of limitations, or they will rely upon their own ingenuity for self protection, thereby requiring a great deal more tax litigation, which would be ruinous to the national fisc. No government can afford to have litigation with respect to but a very small percentage of its cases, but if people lose confidence in the tax tribunals to fairly decide all questions of taxation, including questions of the statute of limitations, the result would be very detrimental to the Government.

It need not be pointed out to this Court that there is a statute of limitations on suits for recovering taxes overpaid, nor that the Government very diligently invokes the statute of limitations on every possible occasion. Naturally, the Government pleads the statute of limitations in those cases because justice requires it.

What is justice for the Government is justice for the taxpayer. Furthermore, taxes are not determined by the application of equitable principles, but by the application of the statutory language. An exception is made in cases calling for the doctrine of estoppel, but the facts of the present case do not invoke the principle of estoppel in the Government's favor.

Appellee says, on pages 25 and 26 of its brief, that the various corporate entities involved in this matter, were separate entities in legal form only, and that in transferring the assets from one to another there was no change at any time in either beneficial interests or control, and that the Court should disregard the legal fiction of separate entities, and prevent appellant from setting up the defense of the statute of limitations.

This again is a plea for estoppel without squarely meeting the issues involved in the question of estoppel, and without proving the various elements of estoppel to be present. The question of estoppel is gone into quite extensively in appellant's opening brief. The facts were all fully and clearly known by the appellee, within proper time for it to act. The corporations were all separate and tax liabilities were separately recognized by appellee; the various procedures in the audit of the return were entirely separate, and appellee is simply trying to put the blame on others for its own delinquencies. When the Government brings suit in 1938 for 1923 and 1924 taxes of corporations which had long been dissolved, of which dissolution the Government had full and timely notice, it would seem that it was a proper case for the application of the statute of limitations to put a repose to the said litigation.

As can be seen from any daily paper, the stock of appellant is listed upon the stock exchange and it may be assumed that its stockholders constantly change from time to time. It would be entirely inequitable to hold appellant liable for the tax liabilities of other corporations which accrued seventeen and eighteen years ago, on account of transfers which occurred eleven years ago, because of the acts of a few of appellant's stockholders, who were trustees of predecessor corporation, taken approximately ten years ago.

Appellee, on page 25 of its brief, cites the case of *Wiethoff v. Refining Properties, Ltd.*, 8 Cal. App. (2d) 64, as authority for the proposition that the Court should look through the fiction of corporate entities.

The cited case has no bearing on the situation involved in the case at bar. Entirely different issues were involved.

Furthermore, none of the companies involved in the case at bar, except appellant, were involved in the cited case. Other corporations involved in the cited case were Signal Oil and Gas Company of California, Pacific Service Stations and Refining Properties, Ltd., all apparently organized after Signal Gasoline Company and Signal Gasoline Corporation had been dissolved. The situation there involved several companies which were in existence at the same time. In the case at bar, the situation involved corporations which had been dissolved before, or about the time appellant was organized.

Appellant also cites, on page 26 of its brief, *Higgins v. Smith,* 308 U. S. 473, as authority for the proposition that separate corporate entities in the case at bar should be disregarded.

But in *Higgins v. Smith. supra,* the question was the deductibility of a loss purportedly sustained by the sole stockholder of a corporation, on the sale of securities to that company. There a jury had found that the corporation was created for tax savings purposes of the sole stockholder and was simply an agent of the taxpayer. There, also, the issue involved was the matter of a deduction against gross income. The courts have uniformly held that in claiming deductions, the statute must be strictly construed and the taxpayer must prove that his claim comes strictly within the statutory language.

In the case of the statute of limitations, however, the courts have ruled that questions of doubt must be ruled strictly against the Government, and in favor of the taxpayer. See pages 31 and 32 of appellant's opening brief.

In *Higgins v. Smith,* the taxpayer deliberately sought to save taxes by setting up a corporation and had that

subject uppermost in his mind in making transactions with it. In the case at bar, all transactions involved were regular business transactions involving a substantial number of persons with no deliberate attempt or consciousness of tax saving, or tax avoidance.

Case No. 1461-Y.

The principal contentions of the appellant with respect to Case No. 1461-Y can be restated as follows:

1. That the alleged assessment made against Signal Gasoline Corporation was invalid; hence no tax was shown to be due, and no six-year period for bringing suit was started by the void assessment;

2. That even if it were valid, it would not give the Government six years within which to sue a transferee of a transferee;

3. Appellant is the transferee of a transferee of the assets of Signal Gasoline Corporation, because its statutory trustees were the first transferees of the assets of Signal Gasoline Corporation, and appellant received the assets from the first transferees, namely, the statutory trustees of Signal Gasoline Corporation.

Appellee does not cite any authority in answering the last contention listed above. As shown on pages 27 to 30, inclusive, of appellant's opening brief, the statutory trustees of Signal Gasoline Corporation constituted the first transferees. Consequently, appellant was the second transferee of the assets of Signal Gasoline Corporation and under *United States v. Continental National Bank*

and Trust Co., supra, the Government did not have six years after the alleged assessment was made against the first transferee to sue appellant, the second transferee of the assets of Signal Gasoline Corporation.

As pointed out in appellant's opening brief, the appellee made two mistakes of law and is now trying to shift the loss and blame to other persons. These mistakes were the following: First, after having been advised that Signal Gasoline Corporation had been dissolved, it failed to properly construe Section 400 of the California Civil Code, to the effect that the dissolution of a California corporation completely destroyed it. Appellee thereafter continued to regard the dissolved corporation as being in existence, instead of dealing with its statutory trustees as a separate entity; second, appellee construed Section 278 (d) of the Revenue Act of 1926 as giving it a six-year period within which to sue the transferee of a transferee of the assets of a taxpayer. This was erroneous, as shown by the decision of the Supreme Court of the United States, in *United States v. Continental National Bank and Trust Co., supra.*

The appellee made these mistakes of law and took the wrong procedure and the present suits are barred by the statute of limitations, and appellee should not be permitted to do what this Court barred it from doing in *Van Antwerp v. United States,* 92 Fed. (2d) 871. There this Court said:

> "* * * It was incumbent upon the Commissioner to reaudit her income for that year as soon as the

> Malcom decision advised him of his error. This for the protection of the Treasury, which otherwise would lose what she owed, because of the Government's wrong interpretation of the law. Fourteen months remained for such reaudit and deficiency assessment, during which the Government did nothing. Having failed to do so, it seeks to transfer the loss from that neglect to the appellant taxpayer."

In conclusion it is submitted that the decisions for the District Court were incorrect and that the judgments should be reversed.

Dated: July 31, 1941.

Respectfully submitted,

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